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Section 9 (a) 13
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In the Supreme Court of the United States

OCTOBER TERM, 1952

No. 452

MOTOROLA, INC., *Petitioner*

v.

NATIONAL LABOR RELATIONS BOARD

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court below (R. 426-433) is reported at 199 F. 2d 82. The findings of fact, conclusions of law, and order of the National Labor Relations Board (R. 54-57, 18-44) are reported at 94 NLRB 1163.

JURISDICTION

The judgment of the court below was entered on September 30, 1952 (R. 433). The petition for a writ of certiorari was filed on November 14, 1952. The jurisdiction of this Court is invoked under 28 U. S. C. 1254, and under Section 10 (e) of the National Labor Relations Act, as amended.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Supp. V, 151 *et seq.*), appear in the Appendix, *infra*, pp. 13-14.

QUESTION PRESENTED

The union representing a majority of petitioner's employees repeatedly requested the petitioner to bargain. The petitioner responded with a series of unfair labor practices. The union thereupon filed a petition for certification with the Board. Petitioner continued its campaign of unfair labor practices designed to destroy the union's majority. The union thereupon withdrew its petition for certification and filed an unfair labor practice charge with the Board. The question presented is whether petitioner may thereafter escape liability for its refusal to bargain because the union was not certified by the Board.

STATEMENT

Following the usual proceedings under the Act, the court below approved the Board's findings that

petitioner had violated Sections 8 (a)(1) and (5) of the Act by refusing to meet and negotiate with the International Association of Machinists, District Lodge No. 49 (herein called the Union), by unilaterally increasing wages without negotiating them with the Union, and by precipitately increasing wages as soon as it learned of the Union's organizational activities, in order to discourage Union membership. Petitioner challenges the decision below only insofar as it upholds the Board's finding that petitioner refused to bargain collectively, in violation of Section 8 (a)(5).

A. The Facts as Found by the Board

By July 7, 1950, 19 of petitioner's 24 machine-shop employees at its Phoenix plant had signed authorization cards designating the Union as their agent for purposes of collective bargaining (R. 27; 65-68, 151, G. C. Ex. 2).[1] On July 10, the Union representative called upon the director of the Phoenix plant, stated that he represented a majority of petitioner's machinists, and requested that the Union be recognized as their bargaining

[1] References to portions of the printed record are designated "R." Wherever a semicolon appears in a series of references, the references preceding the semicolon are to the Board's findings; those following the semicolon are to the supporting evidence. The original documentary exhibits introduced at the Board hearing by the General Counsel and the petitioner (respondent before the Board), which have been filed with the Court, are referred to as "G. C. Ex." or "Res. Ex.", as the case may be.

agent (R. 27-28; 67-72, 192-199). The director answered that the request would have to be referred to the Company's personnel department in Chicago, and that an answer would be forthcoming in ten days (R. 28; 71, 86-87, 195, 227, 233).

On July 12, petitioner's Chicago personnel director arrived in Phoenix, and remained until the afternoon of the 14th (R. 29; 299, 313). On the 13th and 14th he conducted a series of private interviews with each of the hourly paid employees in the plant (R. 29; 116-118, 142, 157, 306-308). On July 13th he also delivered a lecture to the employees, explaining the advantages of petitioner's pension and group insurance plans, and stating that wage increases were in process (R. 29; 119, 309-312). The next day he completed his series of individual interviews, exhibited an "orientation" film to another assembly of the employees, and finished work on a schedule of wage increases for the machinists and other hourly paid workers in the plant (R. 312-313). These increases were put into effect immediately (R. 29; 200, 311-313, G. C. Ex. 5, pp. 4-5), retroactive to June 19 in the case of the machinists' group. The Union representative promptly protested these unilateral wage increases, and endeavored without success to arrange a meeting with the Chicago personnel director (R. 29-30; 72, 73-74, 200, 202, 203, 312, 313).

On July 18, the Union filed with the Board a petition for representation (R. 31; 77). On July 19,

petitioner's Chicago director returned to Phoenix, but failed to meet with the Union representative, who had left the city on a business trip (R. 30; 314-315, 364-365). On July 22, the Union representative called upon the Company's lawyer and was told that the Company would not recognize the Union unless it obtained a Board certification (R. 30; 76). He advised the Union representative not to "fool with the Motorola plant" (R. 75, 371), pointing out that the Company did not recognize unions at any of its plants (R. 30; 75-76). He refused to consent to an election (R. 31; 75-76). On and after July 17, the Company unilaterally instituted several wage increases without consulting the Union (R. 29; G. C. Ex. 5, pp. 7, 22, letter dated October 13, 1950, attached to G. C. Ex. 6). On July 31, the Union filed the unfair labor practice charge which gave rise to this proceeding; at or about the same time it withdrew its representation petition (R. 1, 77, G. C. Exs. 3, 4).

B. The Board's Conclusions of Law

Considering the detailed evidence and findings briefly summarized above, the Board concluded that the Company's failure to recognize and bargain with the Union, on and after July 10, 1950, was not justified by any "good faith doubt" (R. 38) as to the Union's majority in an appropriate unit. Accordingly, the Board found that the Company violated Section 8 (a)(5) of the Act, by pur-

posefully evading its obligation to recognize the Union, and by unilaterally changing the pay rates of the employees in the bargaining unit on and after July 17 (R. 41). Petitioner does not attack the propriety of the Board's further conclusion that this conduct, coupled with the precipitate wage increase of July 14, unlawfully interfered with, restrained, and coerced the employees in the exercise of the self-organizational and collective bargaining rights guaranteed to them by Section 7 of the Act, in violation of Section 8 (a)(1) (R. 41). The Board ordered that respondent cease and desist from these unfair labor practices, bargain collectively upon request, and post appropriate notices (R. 55-57).

C. The Decision of the Court Below

The court of appeals, reviewing the entire record, approved the findings and conclusions of the Board, and decreed that the Board's order be enforced in full (R. 433-437).

ARGUMENT

1. The contention that an employer's duty to bargain arises only after Board determination of the appropriate unit and of the union's majority status has long been rejected as "untenable" (*National Labor Relations Board* v. *Piqua Munising Wood Products Co.*, 109 F. 2d 552, 556 (C. A. 6)) and "frivolous" (*National Labor Relations Board*

v. *Dahlstrom Metallic Door Co.*, 112 F. 2d 756, 757 (C. A. 2)), and poses no issue warranting review by this Court. Where, as here, the union in fact represents a majority of the employees and the employer does not have a *bona fide* doubt of that fact, the employer may not insist on Board certification as a prerequisite to bargaining. This rule is especially significant where, as here, the employer counters the request for bargaining with unfair labor practices intended to dissipate the union's majority. *National Labor Relations Board* v. *National Seal Corp.*, 127 F. 2d 776 (C. A. 2); *National Labor Relations Board* v. *Clarksburg Publishing Co.*, 120 F. 2d 976, 980 (C. A. 4); see also *Lebanon Steel Foundry* v. *National Labor Relations Board*, 130 F. 2d 404, 409 (C. A. D. C.), certiorari denied, 317 U. S. 659; *National Labor Relations Board* v. *Federbush Co.*, 121 F. 2d 954, 956 (C. A. 2); *National Labor Relations Board* v. *Remington Rand, Inc.*, 94 F. 2d 862, 868 (C. A. 2), certiorari denied, 304 U. S. 576, 585; *Idaho Potato Growers* v. *National Labor Relations Board*, 144 F. 2d 295, 307 (C. A. 9), certiorari denied, 323 U. S. 769.

There is no merit to petitioner's argument that the 1947 amendments were designed to repeal this rule and to permit employers to evade their obligation to bargain collectively with the majority representative. There is no support for the contention that Congress intended to permit the employer, while refusing to recognize the majority

representative, to undermine that majority status before an election can be held. The courts of appeals are unanimously agreed that the 1947 amendments had no such effect. *E.g., National Labor Relations Board* v. *Kobritz, d/b/a Star Beef Co.*, 193 F. 2d 8, 14 (C. A. 1); *National Labor Relations Board* v. *Everett Van Kleeck & Co., Inc.*, 189 F. 2d 516, 517 (C. A. 2); *National Labor Relations Board* v. *Inter-City Advertising Co.*, 190 F. 2d 420, 421 (C. A. 4), certiorari denied, 342 U. S. 908; *National Labor Relations Board* v. *Houston & North Texas Motor Freight Lines, Inc.*, 193 F. 2d 394 (C. A. 5), certiorari denied, 343 U. S. 934; *Joy Silk Mills, Inc.* v. *National Labor Relations Board*, 185 F. 2d 732, 741 (C. A. D. C.), certiorari denied, 341 U. S. 914. It is settled that, since the Union represented a majority of the employees in the appropriate unit prior to the employer's campaign to defeat the Union, the Board may not only adjudicate the past unfair labor practice, but may also remedy that violation by ordering the Company to bargain with the Union in the future, without conducting an election to find out whether the Company's anti-union campaign was successful. *Franks Bros. Co.* v. *National Labor Relations Board*, 321 U. S. 702. The questions which petitioner presents are the same questions which this Court refused to review in *Inter-City Advertising Co.* v. *National Labor*

Relations Board, 342 U. S. 908 (No. 384, 1951 Term).

2. Much of petitioner's brief is devoted to the argument that the Board lacked authority to dismiss the representation proceeding because of the pendency of the unfair labor practice charges.[2] This question is no different from that which this Court refused to review in *Houston & North Texas Motor Freight Lines, Inc.* v. *National Labor Relations Board,* 343 U. S. 934 (No. 656, 1951 Term). The Board's Brief in Opposition in that case pointed out that even if it could be assumed that the Board erred in dismissing the representation proceeding, and that its action is subject to judicial review, the proceeding forms no part of the record in the unfair labor practice proceeding; consequently, the propriety of the Board's action in the representation proceeding cannot be placed in issue in the unfair labor practice proceeding, either in the court below or on review by this Court.

In any event, the Board's action in dismissing the representation proceeding because of the pendency of the unfair labor practice charges was manifestly correct, and *a fortiori* not an abuse of the Board's "wide discretion in determining the procedure necessary to insure the fair and free

[2] The propriety of this action does not appear to be raised in the petitioner's statement of the Questions Presented (Pet. 2), and therefore would not seem to be before this Court.

choice of bargaining representatives by employees.'"[3] Inasmuch as the pending unfair labor practice charges alleged an unlawful refusal to bargain with the Union, a decision in the unfair labor practice case sustaining the charge would necessarily have resulted in an order to bargain, regardless of the outcome of the election which the Union originally sought in the representation proceedings. *Franks Bros. Co.* v. *National Labor Relations Board*, 321 U. S. 702, 704-705; *Medo Photo Supply Corp.* v. *National Labor Relations Board*, 321 U. S. 678, 687; *National Labor Relations Board* v. *P. Lorillard Co.*, 314 U. S. 512, 513; *International Association of Machinists* v. *National Labor Relations Board*, 311 U. S. 72, 81-82; *National Labor Relations Board* v. *Bradford Dyeing Assn.*, 310 U. S. 318, 339-340; *West Texas Utilities Co.* v. *National Labor Relations Board*, 184 F. 2d 233, 240 (C. A. D. C.), certiorari denied, 341 U. S. 939; *National Labor Relations Board* v. *Tower Hosiery Mills, Inc.*, 180 F. 2d 701, 706 (C. A. 4), certiorari denied, 340 U. S. 811; *D. H. Holmes Co.* v. *National Labor Relations Board*, 179 F. 2d 876, 879-880 (C. A. 5). In that event, the holding of the election would have been a useless act; accordingly,

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[3] *Southern S. S. Co.* v. *National Labor Relations Board*, 316 U. S. 31, 37; see also *National Labor Relations Board* v. *Waterman Steamship Corp.*, 309 U. S. 206, 226; *National Labor Relations Board* v. *Falk Corp.*, 308 U. S. 453, 458; *National Labor Relations Board* v. *A. J. Tower Co.*, 329 U. S. 324, 330.

the Board properly followed its customary, and judicially approved, course of declining to proceed further with the representation case because of the pendency of the unfair labor practice case. *Kansas City P. & L. Co.* v. *National Labor Relations Board,* 111 F. 2d 340, 358 (C. A. 8); *Warehousemen's Union* v. *National Labor Relations Board,* 121 F. 2d 84, 94 (C. A. D. C.), certiorari denied, 314 U. S. 674; *National Labor Relations Board* v. *Auburn Foundry, Inc.,* 119 F. 2d 331, 334 (C. A. 7).[4] Contrary to petitioner's contention, nothing in the 1947 amendments imposed a mandatory duty upon the Board to proceed in a representation case —to hold an election which the Board itself would thereafter properly set aside. Cf. *Herzog* v. *Parsons,* 181 F. 2d 781 (C. A. D. C.), certiorari denied, 340 U. S. 810.

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[4] *Continental Southern Corp.,* 83 N. L. R. B. 668, relied on by petitioner (Pet. 12-14) is inapposite; no unfair labor practice charges were filed in that case. Further, it was not, as here, the petitioning party which was attempting to dismiss the petition for certfication.

CONCLUSION

The decision of the court below is plainly correct and presents neither a conflict of decisions nor any question warranting review. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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DECEMBER, 1952.

APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C., Supp. V, 151, *et seq.*) are as follows:

* * * * *

Unfair Labor Practices

Sec. 8. (a) It shall be an unfair labor practice for an employer—

* * * * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9 (a).

* * * * *

Representatives and Elections

Sec. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: * * *

* * * * *

Sec. 10. * * *

* * * * *

(e) The Board shall have power to petition any circuit court of appeals of the United

States * * * within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceedings, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. * * * The jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review * * * by the Supreme Court of the United States upon writ of certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347).

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